



DEPARTMENT OF THE NAVY  
BOARD FOR CORRECTION OF NAVAL RECORDS  
2 NAVY ANNEX  
WASHINGTON DC 20370-5100

BJG  
Docket No: 899-00  
6 April 2000

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: SSGT [REDACTED] USMC [REDACTED]  
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 19 Jan 00 w/attachments  
(2) HQMC MI memo dtd 10 Mar 00  
(3) Subject's ltr dtd 24 Mar 00  
(4) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected by removing two service record book (SRB) page 11 ("Administrative Remarks (1070)") entries: the page 11.a entry dated 22 January 1997 with Petitioner's undated rebuttal, and the page 11.b entry dated 27 February 1997, copies of which are in enclosure (1) at Tabs A and B.

2. The Board, consisting of Messrs. Goldsmith and Zsalman and Ms. Taylor, reviewed Petitioner's allegations of error and injustice on 30 March 2000, and pursuant to its regulations, determined that the limited corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. The contested page 11.a entry dated 22 January 1997 (Tab A to enclosure (1)) reads as follows:

Counseled this date concerning my alcohol-related incident, specifically, DUI [driving under the influence], refusal to submit to a chemical analysis and reckless driving in Albany, GA [Georgia] at 2139 [hours] on [11 January 1997]. I am advised that within 5 [sic] working days after

acknowledgement of this entry a written rebuttal could be submitted and that such a rebuttal will be filed on the document side of the service record. I choose (to) make such a statement...

Petitioner's rebuttal to this page 11.a entry states he asked his commanding officer (CO) if the entry would be removed from his SRB if the charges were dismissed or dropped. He says that his CO told him to ask the first sergeant (1stsgt). He states that the 1stsgt informed him that if the charges were dismissed or dropped, a new entry would be added to reflect this. Petitioner states that he asked the 1stsgt if his civilian attorney needed to see the entry, and was informed that this was strictly a military matter, so there was no reason that his attorney needed to see it. Petitioner signed the entry, however, he said that he was not thinking clearly, and that he felt pressured to sign it. He says that although he had been merely charged with the offenses, he believed that the Marine Corps had already found him guilty.

c. The contested page 11.b entry dated 27 February 1997 (Tab B to enclosure (1)) stated Petitioner had been "Found not fit for recruiting duty due to an alcohol related incident." It recommended he "Conduct [himself] in the manner expected of all Marines and the high standards for a SNCO" and advised him of individuals from whom assistance was available. Petitioner chose not to submit a rebuttal statement.

d. Petitioner now objects to the page 11.a entry on the ground that it was made before the charges against him had been adjudicated in civil court. He further contests the statement, in this entry, that he had an "alcohol-related incident," noting that he was ultimately found not guilty of DUI and received no conviction for failure to submit to a chemical analysis, but was convicted of reckless driving only. He alleges that his former staff noncommissioned officer (SNCO) in charge tried to have the entry pulled by higher authority in his command, but was unsuccessful. Regarding the page 11.b entry, Petitioner now contends that it resulted from the page 11.a entry; and that since he was found not guilty of DUI and received no conviction for failure to submit to a chemical analysis, this entry should be removed. Regarding both entries, he asserts such "administrative punishment" was based on "'impact' and not the 'facts'."

e. In correspondence attached as enclosure (2), the Headquarters Marine Corps office having cognizance over the subject matter of Petitioner's request has commented to the effect that the contested entries should stand, but that the page 11.a entry should be modified by deleting "DUI." This advisory opinion includes the following:

...

4. The following comments concerning the page 11 entry dated [22 January 1997] are provided:

a. The counseling entry, though very brief and direct, meets the elements of a proper page 11 counseling entry as required by [Marine Corps Order (MCO) P1070.12H, the Marine Corps Individual Records Administration Manual (IRAM)]. Additionally, it states that [Petitioner] was provided the

opportunity to make a rebuttal statement and that he annotated his intention to make such a statement. [Petitioner] acknowledged the counseling entry by his signature.

b. The instructions contained in...the IRAM requires [sic] the commander to refer to MCO P5300.12, The Marine Corps Substance Abuse Program. Paragraph 1201 of MCO P5300.12 states in part: "Any action taken by a commander in response to an incident of alcohol abuse is reactive in nature. The objectives of the Reactive Phase are to: Confirm an incident of alcohol abuse has occurred; Take [sic] appropriate disciplinary, judicial, or administrative action if a violation of the UCMJ [Uniform Code of Military Justice] has occurred or if the incident involved misconduct or substandard performance of duty."

c. Paragraph 1204 of MCO P5300.12 states "Any alcohol-related misconduct or unsatisfactory performance will be subject to prompt and appropriate administrative action. 'Alcohol-related' means any incident where it is determined that the consumption of alcohol was a contributor. All incidents of alcohol abuse will be the subject of formal command counseling with the Marine involved. Commanders may [emphasis in original] direct an OQR [Officer Qualification Record]/SRB entry be made after counseling a Marine for a first alcohol-related incident."

d. [The IRAM] authorizes "Commanders to direct a [sic] SRB entry be made after counseling a Marine for a first or subsequent alcohol-related incident.".. [sic] Formal counseling was effected by the commanding officer through the use of the Administrative Remarks page 11 of the SRB.

e. The City of Albany Municipal Court document..., is documented evidence that supports the commander's decision to direct a page 11 entry be made after counseling, based upon [Petitioner's] refusal to submit to a chemical analysis on [11 January 1997].

f. [Petitioner] states that the page 11 entry is in error or unjust because "the page 11(a) entry was made prematurely, before the matter had been adjudicated". In support his [sic] claim, he provides numerous character references from his peers and superiors alike and refers to the matter adjudicated by the City of Albany Municipal Court, "NOL PROS" [nolle prosequi], which is irrelevant; the EVENT [emphasis in original] still occurred. [In fact, the documentation does not show nolle prosequi; rather, it shows Petitioner pleaded "nolo contendere," which has the effect of a guilty plea, to the charge of reckless driving only.]

g. [Petitioner's] commander determined that the information contained in the page 11 entry was of permanent value to his career, thereby documenting this event...

5. The following comments concerning the page 11 entry dated [27 February 1997] are provided:

a. The counseling entry meets the elements of proper a [sic] page 11 counseling in that it lists specific deficiencies and recommendations for corrective action, where assistance can be found and states that the Marine was provided the opportunity to make a rebuttal statement. The Marine must annotate whether or not they [sic] choose to make such a statement and if made, a copy of the statement is filed in the service record. [Petitioner] acknowledged the counseling entry by his signature and further elected not to make a statement in rebuttal.

b. [Petitioner's] commander determined that the information contained in the page 11 entry was required by [MCO] 1326.6 [concerning handling of enlisted recruiters]..., "noting individual shortcomings or deficiencies", and to provide an opportunity for [Petitioner] to correct these specific problem areas.

6. In view of the above, it is recommended that:

a. [Petitioner's] request for removal from his service records the page 11 counseling entries dated [22 January, 27 February 1997] and Rebuttal to Page 11 Entry, undated, be disapproved.

b. The Board for Correction of Naval Records direct that the word [sic] "DUI" be stricken from the page 11(a) counseling entry dated [22 January 1997]...

g. Enclosure (3) is Petitioner's rebuttal statement to the advisory opinion. He contends that the contested page 11.a entry does not contain the elements required by the IRAM for a proper page 11 counseling entry. He argues that he was not involved in an "alcohol related incident" as that term is used in MCO P5300.12A, because the incident did not result in a violation of the UCMJ. He further contends that even if he had been involved in an alcohol-related incident, his command would have been responsible, per MCO P5300.12A, for conducting a "formal counseling session" and submitting a "DC" (directed by the Commandant of the Marine Corps) fitness report, actions they did not take. He notes that the court documents and his lawyer's letter fail to substantiate that he was even charged with refusal to submit to chemical analysis, which is not a chargeable offense in any case. He expresses his belief that his 1stsgt added to the page 11.a entry the reference to his refusal to submit to chemical analysis, in order to keep him from being promoted. He repeats his point that this page 11 entry was premature, since the charges against him had not been adjudicated

in court. He concludes by stating that he received a Navy and Marine Corps Commendation Medal for the period 18 January 1994 to 1 October 1997, during which he received the contested page 11 entries, from the same command that issued these entries.

h. Under Article 111 of the UCMJ, reckless driving is an offense

#### CONCLUSION:

Upon review and consideration of all the evidence of record, the Board finds an injustice warranting limited relief, specifically, removal of "DUI" from the contested page 11.a entry dated 22 January 1997.

The Board agrees with the recommendation, in the advisory opinion at enclosure (2), to remove "DUI" from the contested page 11.a entry. They find that the entry could be read erroneously to indicate that Petitioner had been convicted of DUI.

The Board substantially concurs with the pertinent portion of the advisory opinion in concluding that complete removal of the page 11.a entry is not warranted. They reject Petitioner's argument that the incident cited did not involve a violation of the UCMJ, as reckless driving does, in fact, violate the UCMJ, specifically, Article 111. They find the failure of Petitioner's command to submit a "DC" fitness report on him does not establish that he had no alcohol-related incident. They are unable to find that he was not formally counseled about the incident, but they do find that even if he were not counseled, this would not justify granting the relief he seeks. They agree with him that refusal to submit to a chemical analysis is not a crime in itself, so the absence of any reference to this in the court documents does not prove such refusal did not occur. They are unable to find that his 1stsgt fabricated the portion of the contested page 11.a entry relating to his refusal to submit to a chemical test, nor can they accept Petitioner's assertion that the 1stsgt added it just to prevent Petitioner's promotion. They find that such a refusal was a proper matter for inclusion in a page 11 entry documenting an alcohol-related incident. Finally, they find that the page 11 format requirements he cited do not apply to a page 11 entry for an alcohol-related incident.

Since the Board finds no basis to remove the contested page 11.a entry as amended in accordance with the advisory opinion's recommendation, and they agree with the advisory opinion in finding that the contested page 11.b entry dated 27 February 1997 is procedurally correct, they conclude that this entry should stand.

In view of the above, the Board directs the following limited corrective action.

## RECOMMENDATION:

a. That Petitioner's record be corrected by deleting "DUI" from Petitioner's SRB page 11.a ("Administrative Remarks (1070)") entry dated 22 January 1997. In accomplishing this, the material to be removed is to be completely obliterated so it cannot be read, rather than merely lined through.


b. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

c. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

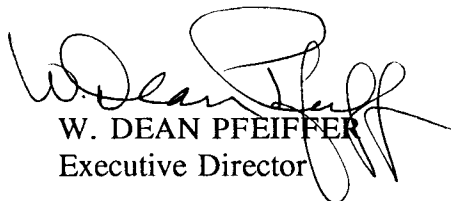
d. That Petitioner's request to remove completely the page 11.a entry dated 22 January 1997 with his undated rebuttal and the page 11.b entry dated 27 February 1997 be denied.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN  
Recorder

  
JONATHAN S. RUSKIN  
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

  
W. DEAN PFEIFFER  
Executive Director



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
3280 RUSSELL ROAD  
QUANTICO, VIRGINIA 22134-5103

899-00

IN REPLY REFER TO:

1070

MI

10 MAR 2000

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF  
NAVAL RECORDS

Subj: BCNR APPLICATION IN THE CASE OF STAFF SERGEANT [REDACTED]  
[REDACTED] USMC

1. We reviewed Staff Sergeant [REDACTED] application concerning his request for removal of the Administrative Remarks page 11 entries dated 970122 and 970227 and Rebuttal to Page 11 Entry, undated, from his service records.

2. MCO P1070.12H, Marine Corps Individual Records Administration Manual (IRAM), authorizes commanders to make entries on page 11 which are considered matters forming an essential and permanent part of a Marine's military history, which are not recorded elsewhere in the Service Record Book (SRB), medical records, or the Marine's automated record and will be useful to future commanders.

3. One of the many leadership tools that a commander has at their disposal is counseling and rehabilitation for their Marines. Marine Corps policy is that reasonable efforts at rehabilitation should be made prior to initiation of separation proceedings and that commander is authorized to document those efforts by a page 11 counseling entry per the IRAM. The Marine Corps Separation Manual, paragraph 6105, sets forth policy pertaining to counseling and rehabilitation. In cases involving unsatisfactory performance, pattern of misconduct, or other bases requiring counseling under paragraph 6105, separation processing may not be initiated until the Marine is counseled concerning deficiencies, and afforded a reasonable opportunity to overcome those deficiencies as reflected in appropriate counseling and personnel records. All reasonable efforts at rehabilitation should be made prior to initiation of separation proceedings.

4. The following comments concerning the page 11 entry dated 970122 are provided:

a. The counseling entry, though very brief and direct, meets the elements of a proper page 11 counseling entry as required by paragraph 4012.3y of the IRAM. Additionally, it states that Staff Sergeant [REDACTED] was provided the opportunity to make a rebuttal statement and that he annotated his intention to make such a statement. Staff Sergeant [REDACTED] acknowledged the counseling entry by his signature.

Subj: BCNR APPLICATION IN THE CASE OF STAFF SERGEANT [REDACTED]  
[REDACTED] USMC

b. The instructions contained in paragraph 4012.3y of the IRAM requires the commander to refer to MCO P5300.12, The Marine Corps Substance Abuse Program. Paragraph 1201 of MCO P5300.12 states in part: "Any action taken by a commander in response to an incident of alcohol abuse is reactive in nature. The objectives of the Reactive Phase are to: Confirm an incident of alcohol abuse has occurred; Take appropriate disciplinary, judicial, or administrative action if a violation of the UCMJ has occurred or if the incident involved misconduct or substandard performance of duty."

c. Paragraph 1204 of MCO P5300.12 states "Any alcohol-related misconduct or unsatisfactory performance will be subject to prompt and appropriate administrative action. 'Alcohol-related' means any incident where it is determined that the consumption of alcohol was a contributor. All incidents of alcohol abuse will be the subject of formal command counseling with the Marine involved. Commanders may direct an OQR/SRB entry be made after counseling a Marine for a first alcohol-related incident."

d. Paragraph 4012.3y of the IRAM authorizes "Commanders to direct a SRB entry be made after counseling a Marine for a first or subsequent alcohol-related incident.".. Formal counseling was effected by the commanding officer through the use of the Administrative Remarks page 11 of the SRB.

e. The City of Albany Municipal Court document, enclosure (3), is documented evidence that supports the commander's decision to direct a page 11 entry be made after counseling, based upon Staff Sergeant [REDACTED] refusal to submit to a chemical analysis on 970111.

f. Staff Sergeant [REDACTED] states that the page 11 entry is in error or unjust because "the page 11(a) entry was made prematurely, before the matter had been adjudicated". In support his claim, he provides numerous character references from his peers and superiors alike and refers to the matter adjudicated by the City of Albany Municipal Court, "NOL PROS", which is irrelevant; the EVENT still occurred.

g. Staff Sergeant [REDACTED] commander determined that the information contained in the page 11 entry was of permanent value to his career, thereby documenting this event per the provisions of the IRAM.



Subj: BCNR APPLICATION IN THE CASE OF STAFF SERGEANT [REDACTED]  
[REDACTED] USMC

5. The following comments concerning the page 11 entry dated 970122 are provided:

a. The counseling entry meets the elements of proper a page 11 counseling in that it lists specific deficiencies and recommendations for corrective action, where assistance can be found and state that the Marine was provided the opportunity to make a rebuttal statement. The Marine must annotate whether or not they choose to make such a statement and if made, a copy of the statement is filed in the service record. Staff Sergeant [REDACTED] acknowledged the counseling entry by his signature and further elected not to make a statement in rebuttal.

b. Staff Sergeant [REDACTED] commander determined that the information contained in the page 11 entry was required by Marine Corps Order 1326.6, paragraph 5a(3), "noting individual shortcomings or deficiencies", and to provide an opportunity for Staff Sergeant [REDACTED] to correct these specific problem areas.

6. In view of the above, it is recommended that:

a. Staff Sergeant [REDACTED] request for removal from his service records the page 11 counseling entries dated 970122, 970227 and Rebuttal to Page 11 Entry, undated, be disapproved.

b. The Board for Correction of Naval Records direct that the word "DUI" be stricken from the page (11)a counseling entry dated 970122.

7. Point of contact is Mr. [REDACTED] at [REDACTED]

[REDACTED]  
G. [REDACTED]  
Head, Field Support Branch  
Manpower Management Information  
System Division